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IN THE

Supreme Court of the United States

NO. 876.

C. L. ADDINGTON,
Plaintiff in Error,

versus.

THE UNITED STATES,
Defendant in Error.

IN ERROR OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Brief of
LEE, OWNBY & JONHSON,
Attorneys for Plaintiff in Error.

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C. L. ADDINGTON,
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Defendant in Error.

IN ERROR OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Brief on Behalf of Plaintiff in Error.

STATEMENT.

On the 27th day of November, A. D., 1895, the plaintiff in error, C. L. Addington, and one E. D. Buchannan were jointly indicted in the Circuit Court of the United States for the Eastern District of Texas, for the crime of murder. The said indictment in substance alleges that, said C. L.

Addington and E. D. Buchannan, in Red River county, Choctaw Nation, Indian Territory, on the 28th of June, 1895, with malice aforethought, did make an assault in and upon one Oscar Hodges with a pistol loaded with gunpowder and leaden bullets, and that said assault was made by firing and discharging the contents of said pistol at, in and upon the body of said Oscar Hodges with the intent to take his life, and that by said assault and as a result of the firing of said pistol, they, the said C. L. Addington and E. D. Buchanan, killed and murdered the said Oscar Hodges.

On May 31st, 1896, the defendants, Addington and Buchanan, went to trial under said charge and on June 1st, the said C. L. Addington was found "guilty" by the jury as charged in said indictment, and E. D. Buchanan was found "not guilty" and judgment entered in accordance with the verdict of the jury in said Circuit Court.

Plaintiff in error, C. L. Addington, contends that, in the trial of said cause there were certain errors committed prejudical to him, and, to the end that justice may be done and that all such errors, if any there be, may be corrected by this Honorable Court, he asks that the above styled cause and all the proceedings of said Circuit Court therein be re-examined and the judgment rendered therein reversed upon the Writ of Error allowed July 10th, 1896, by Hon. D. E. Bryant, the United States District Judge for the Eastern District of Texas.

ARGUMENT.

The first ten Assignments of Error are based upon

Bill of Exceptions, No. 1, and were drawn under the impression that this Honorable Court might see proper to consider the amended motion for a new trial as a part of the record; If such motion may be considered, the tenth ground, embracing affidavits of George Flood, George B. Jackson, William Ohler and J. R. McKinney, is respectfully suggested as entitled to especial consideration. The matters set forth in the affidavits being, as is shown from the record, newly discovered evidence and complies with all the requirements of law which govern the presentation of such testimony as reason for a new trial. The affidavit of Flood shows the intense hatred entertained by the two most important Government witnesses, Barr and Baker, toward Addington, and their statement on the eve of the trial of said Addington that they would know enough to break his neck and head a mob to do it. The affidavit of Ohler shows clearly the defendant's object in going to the home of Hodges to have been for the purpose of procuring cattle, which fact is important, becaust, it was contended by the prosecution on the trial of Addington that his purpose in going to the home of Hodges was to take the life of Hodges. The affidavit of Jackson shows the repeated threats made by Hodges against Addington's life. Said testimony was at least calculated to change the result on another trial of said cause.

The Eleventh Assignment of Error is as to the charge of the Court on manslaughter; Under the Statute of the

United States, (Sec. 5341,) the taking of human life without malice, even though it be intentional, is not manslaughter unless the act is "unlawfully and wilfully" done. We submit that, in any case of homicide where it becomes necessary under the evidence for the trial court to charge the jury on the law of manslaughter, he should give the Statutory definition of the crime: In this case the jury were instructed, in effect, that any intentional killing without malice would be manslaughter, provided there was such gross provocation as to render the party incapable of cool reflection. We do not so understand the law of the United States, certainly the Statute which must control says that this is not sufficient to constitute manslaughter, but, in addition, the killing must be "unlawful and wilful." The fact that the defendant was convicted of a higher grade of homicide than manslaughter does not argue that the Court's charge was not prejudical; the jury might have concluded that the killing was not only intentional but also "unlawful and willful," and, therefore, murder. Had the Court given the Statutory definition of manslaughter they might have found him guilty of that crime only.

Then again, the said charge on manslaughter is assigned as error for the reason, that, under the definition as given in the Court's charge, the defendant might have killed Hodges intentionally and without malice and still not be guilty of any crime whatever, but wholly excusable on the ground of self-defense, even though he was ren-

dered incapable of cool reflection at the time because of some gross provocation then given on the part of Hodges, which said charge would preclude them from returning a a verdict of "not guilty."

The Twelfth Assignment of Error is as to the charge of the Court on the law of self-defense; in which charge the Court instructed the jury, in effect, that. even though the defendant, Addington, had been unlawfully assaulted himself by his adversary and placed in a position of peril where his life was about to be taken or serious bodily harm was about to be done him by the said Hodges, or. if it reasonably appeared to the defendant or would have reasonably indicated to the mind of any other person situated as the defendant was, an intention coupled with the ability on the part of Hodges to take the life of defendant or do him serious bodily harm it would still be the duty of the defendant, Addington, to use all reasonable means at his command to avert the threatened danger. Which portion of said charge is complained of, because, even though the defendant was unlawfully assaulted by his adversary and his life placed in peril by said assault, still, before the defendant could invoke the law of self-defense under said charge he is required to retreat or to use all means in his power to avoid the necessity of taking the life of his adversary.

On a proposition that a party unlawfully assaulted and his life was in peril by said assault, is not compelled to retreat to avoid the necessity of taking the life of his assailant. See following authorities:

1 Whart, Cr. Law, Sec. 98, 99, 487, (9 ed.)

U. S. Sup. C. Rep., vol. 158, Babe Beard vs. U. S., pp. 550, 556, 557, 558, 563, 564.

13 Tex. C. Cr. Ap., King vs. State, p. 277.

The Thirteenth Assignment of Error is as to that paragraph of the Court's charge to the jury set out in said Assignment. It is contended that this charge does not state the correct principle of the law of self-defense in this, that the jury are instructed that before such law could be invoked it must appear that the shot fired by Addington which killed Hodges was fired in his own *actual* self-defense, not actuated by malice, and that the defendant, Addington, did not go to the place of the killing for the durpose of provoking the difficulty for the purpose of killing Hodges. We submit the correct principle of the law of self-defense to be, that the defendant has the right to act upon the appearance of danger, whether as a matter of fact, there was actual danger or not; and we believe the correct principle of law to be, that, even though the defendant might have entertained malice toward Hodges, he would still have the right to defend himself against an unlawful assault upon the part of Hodges.

Said charge does not state the correct principle of law for the further reason that the jury are instructed, in effect, that if the defendant, Addington, went to the place of the killing to provoke a difficulty he would not have the right to defend himself against the assault made by Hodges. We believe the correct principle of law to be

that, no matter what motive the defendant might have had in going to the place of the killing, he would still have the right to defend himself unless he did some act for the purpose of bringing about a deadly combat with deceased and said act must have been calculated and intended to bring about said combat. See following authorities:

Hicks vs. U. S., U. S. R., vol. 150, p. 449.

Thompson vs. U. S., U. S. R., vol. 155, p. 271.

Cartwright et al. vs. The State, 14 Tex. Cr. C. A., p. 486.

White vs. The State, 23 Tex. C. Cr. Ap. p. 154.

Respectfully submitted,

LEE, OWNBY & JONHSON,

Attorneys for Plaintiff in Error.

165-184

DEC 7 1896

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

C. L. ADDINGTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 579.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

C. L. ADDINGTON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 579.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

This case is here on writ of error to the circuit court of the United States for the eastern district of Texas.

The plaintiff in error was indicted for murder at the November term, 1895. He was tried and convicted June 1, 1896, and judgment was entered upon said verdict and sentence of death pronounced June 30, 1896. (Rec., 10.)

ASSIGNMENT OF ERRORS.

The errors assigned to the rulings of the court are fourteen in number. (Rec., 16–19.)

ARGUMENT.

I.

The first ten errors assigned are to the action of the court in overruling the defendant's motion for a new trial upon the nine several grounds on which the motion rested.

In *Blitz* v. *United States* (153 U. S., 312), this court said:

> We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial can not be reviewed upon writ of error. (Citing cases.)

II.

The eleventh, twelfth, and thirteenth grounds of the assignment of error are to three several portions of the charge given by the court to the jury. (Rec., 18–19.) These are all set out in bill of exceptions No. 2. (Rec., 13 to 15.)

That bill was signed by the judge who presided at the trial, with the following explanation which is made a part of the bill:

> The above charges, with other instructions, were given to the jury. The defendant, nor his attorneys, at any time during the trial excepted to any portion or part of the charge, nor before the verdict was rendered; and the first time any exceptions were made by defendant or his attorneys to the charges was made in defendant's motion for a new trial.

This was entirely too late to avail as a ground of error.

In *United States* v. *Carey* (110 U. S., 52), this court said:

> The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise.

Here the exception appears to have been a mere afterthought. The charge was delivered by the judge to the jury in open court in the presence and hearing of the prisoner and his counsel. No objection appears to have been made to any part of the charge. The attention of the court was not directed by counsel to anything in form or substance as objectionable, but the case was allowed to go to the jury, after argument, and their verdict was rendered on June 1. On June 3 the defendant appears to have submitted his motion for a new trial on three grounds (Rec., 6); but not even then was any objection indicated to the charge delivered by the judge to the jury. Not until June 22 did defendant submit his amended motion for a new trial (Rec., 9), which was based, among other grounds, upon the charge delivered by the judge.

III.

The fourteenth assignment of error (Rec., 19) is:

> Because the court erred in overruling the defendant's motion in arrest of judgment.

This motion in arrest of judgment will be found on page 11. It was based upon three grounds, which will be considered in their order.

> *First.* Because said indictment alleges that the said crime of murder was committed in the Choctaw Nation, Indian Territory, and nowhere alleges the fact to be that said C. L. Addington was a noncitizen of said Indian Territory.

In passing upon this motion the learned judge assigned as his reason for overruling it (Rec., 12) that—

> * * * the proof showed that both defendant, C. L. Addington, and deceased, Oscar Hodges, were white men and not citizens of the Indian Territory, the court is of the opinion that the law is against the defendant.

And so the judge certified bill of exceptions No. 3 (Rec., 15), with the explanation that—

> The indictment charges that the deceased, Oscar Hodges, was a white person and a noncitizen of the Indian Territory; and the proof showed that both the deceased and the defendant, C. L. Addington, were both white persons and noncitizens of the Indian Territory.

Whether the averment was a necessary one or not to have been made in the indictment, and whether it is sufficiently made there, become immaterial when it appears, as it does here, that the fact which should have been averred was fully proved before the jury, and the evidence was offered and admitted without objection on the

part of anyone, and without exception being taken thereto.

> *Second.* Because said bill of indictment alleges that the Choctaw Nation, Indian Territory, the place where said crime is alleged to have been committed, was under the exclusive jurisdiction of the United States, when there was no evidence offered to sustain said charge, and in truth and in fact the United States did not have exclusive jurisdiction over the Territory where the crime is alleged to have been committed.

What evidence was or was not admitted at the trial, we have no means of knowing from this record, as none is certified here in any bill of exceptions. And whether the indictment alleges that the place where the crime was committed was under the exclusive jurisdiction of the United States or not is immaterial. That it was under the jurisdiction of the United States and within the jurisdiction of the court in which the accused was indicted, tried, and convicted, is not questioned. So far as the crime charged here is concerned, it was within the exclusive jurisdiction.

By act of March 1, 1889, sections 17 and 18 (25 Stat., 783), the territorial jurisdiction of the eastern judicial district of Texas is defined, and the indictment charges that the offense was committed within that district

> *Third.* Because the verdict of the jury failed to find that the defendant, C. L. Addington, or the deceased, Oscar Hodges, or either of them, were non-citizens of the Indian Territory.

The jury was not charged with the duty of making any finding on the question of the citizenship of the accused or the deceased. The question committed to them was of ascertaining and finding whether or not the defendant was guilty of the crime charged in the indictment. When they found the defendant was guilty, they found that every fact existed which was necessary to his conviction.

HOLMES CONRAD,
Solicitor-General.